# Comparing Courts and Tribunals Through the Lens of Legal Participation

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# Comparing courts and tribunals through the lens of legal participation

*Gráinne McKeever**

## Abstract

This article argues that participation is a core element of procedural justice but that there is a need to understand better what legal participation means to litigants in court hearings. The empirical data on tribunal users' experiences of participation have underpinned a model of legal participation, helping to articulate what procedural justice looks like for this population. Using the lens of legal participation developed through this conceptual tool, the article argues that the focus on participation as a core element of procedural justice in legal proceedings can be used to illuminate the theoretical arguments about what distinguishes courts from tribunals. The concept of legal participation, therefore, provides a way to reorient academic studies of courts and tribunals to provide a new prism to distinguish justice processes.

## Introduction

The question of what makes a court different from a tribunal remains an open one. The difficulty in identifying firm and certain differences is unsurprising given the variety of work, roles and processes that apply across the range of courts and tribunals in the UK. Yet the question remains pertinent, both for practical reasons such as administration, economy and scale, and principled reasons such as facilitating access to justice and ensuring the best fit between legal problems and dispute resolution mechanisms.[1] The answer may continue to be elusive but there is potential to add some clarity through the lens of legal participation to offer a comparative focus on the participative experiences of administrative and employment tribunal users and civil court litigants.

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[1] See JUSTICE, *What is a court?* (2016) available at https://justice.org.uk/wp-content/uploads/2016/05/JUSTICE-What-is-a-Court-Report-2016.pdf

An ability to participate in legal proceedings is a basic facet of access to justice. It is a fundamental element of the right under Article 6 of the ECHR to "effective participation" as the means of accessing the right to a fair trial,[2] but while Article 6 covers most court proceedings, some tribunals – such as immigration tribunals – fall outside its scope. Participation is also core to the overriding objective in the Civil Procedure Rules[3] and the Tribunal Procedure Rules[4] that govern how courts and tribunals in the UK are run. These Rules make it clear that dealing with cases "fairly and justly" means "ensuring … that the parties are able to participate fully in the proceedings".[5] The explicit reference here to participation as a means of meeting the overriding objective, however, shows that participation is not merely a procedural tool but relates to normative perceptions of 'fairness' that access to justice demands. This assertion is underpinned by the procedural justice literature that evidences the desire for fair process as much as favourable outcomes for those using the judicial system to resolve their disputes.[6] Participation is an intrinsic part of procedural justice. It is inherent within the principles articulated by Tyler of voice, neutrality, respect and trust, each of which demand some level of participative potential to be realised.[7] Procedural justice theory is also, helpfully, rooted in a series of studies by Thibault and Walker comparing adversarial and inquisitorial procedures, where the procedural justice advantages of an adversarial process were seen to outweigh those of an inquisitorial process. Focusing on participation as a core element of procedural justice may therefore generate some insight into whether the (clichéd) narrative dichotomy of courts-as-adversarial and tribunals-as-inquisitorial is accurate.

[2] Article 6 ECHR states that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[3] The Civil Procedure Rules 1998. These rules do not apply to Northern Ireland courts which still operate under the County Court Rules (Northern Ireland) 1981, SR 1981/225, Order 58 of which states the overriding objective is to deal with cases "justly" and does not explicitly include participation in meeting that objective

[4] Section 22 of the Tribunals, Courts and Enforcement Act 2007 provides for rules governing the practice and procedure of the First-tier Tribunal and Upper Tribunal, which are made by the Tribunal Procedures Committee. The Rules are created by delegated legislation and relate to the different tribunal jurisdictions, but the overriding objective is common to each. See for example the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 S.I. 2008 No. 2685, rule 2. The majority of tribunals in Northern Ireland do not come within the remit of the 2007 Act. The procedural rules here for each tribunal are different and do not have the same overriding objective. Proposals put forward in 2013 by the Northern Ireland Department of Justice for the simplification and standardisation of rules across different tribunals have not been implemented: *Future Administration and Structure of Tribunals in Northern Ireland*, available at https://www.justice-ni.gov.uk/sites/default/files/consultations/doj/tribunal-consultation.pdf [accessed 26 Feb 2019]

[5] Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, Rule 2(c). This rule is replicated across other tribunal procedure rules

[6] See for example J Thibault and L Walker, *Procedural Justice: A Psychological Analysis* (1975, Hillsdale); E Lind and T Tyler, *The Social Psychology of Procedural Justice* (1988, Springer); T Tyler, "Social Justice: Outcome and Procedure" (2000) 35 *International Journal of Psychology* 117; R Moorhead, M Sefton and L Scanlan, *Just Satisfaction? What drives public and participant satisfaction with courts and tribunals?* (2008) MOJ Research Series 5/08

[7] T Tyler, "Procedural Justice and the Courts" (2007) 44 *Court Review* 217

The range of ways in which individuals experience the dispute resolution processes that culminate in tribunal hearings has been the focus of empirical research with tribunal users.[8] This research established that some tribunal users are fully engaged throughout all, or most, stages of the process; some are able to engage at different points but their engagement is inconsistent; and some experience considerable barriers that block their ability to participate in any or in most aspects of the process. In order to understand these different participative experiences a model of legal participation for tribunal users was created to help identify participative potential, and gaps, in the user experience.[9] What the model reveals is that the participative experience is not dictated by a formal classification of a tribunal as inquisitorial or adversarial or by its general approach as formal or informal, but by the lived experience of delay, legal support, access to information and user expectations. Such features are similar to those pursuing disputes in civil courts, suggesting that it may be possible to understand court user experiences in terms of legal participation, offering the potential to re-evaluate the relative differences between civil courts and tribunals from a user perspective. This paper establishes the significance of participation in procedural justice before analysing the existing arguments that seek to differentiate courts from tribunals, arguing that while there are differences between courts and tribunals, these may not be substantive enough to distinguish the adjudicative venues from a participant's perspective, reinforcing the theoretical analysis that differences between lower tier civil courts and administrative and employment tribunals are more presumed than real. Reviewing the justifications for these distinctions through the prism of participation identifies the extent to which they may be defunct. While participation is not the only means by which such distinctions can or should be evaluated, this paper argues that the academic study of courts and tribunals should be reoriented towards participation as a defining and fundamental feature of dispute resolution, in order to improve our understanding of where disputes should sit on an adjudication spectrum to provide procedural justice.

## Procedural justice and legal participation

The history of procedural justice traverses the literature of both law and psychology. The concept is focused on whether the dispute resolution processes accord with a participant's sense of fairness, which is regarded as a critical factor in generating public trust in the system that, in turn, encourages compliance with its rules.[10] Fairness in how the legal process works

[8] H Genn, B Lever and L Gray, *Tribunals for Diverse Users* (2006, Department for Constitutional Affairs) G McKeever and B Thompson, *Redressing Users' Disadvantage* (2010, Law Centre NI); G McKeever, *Supporting Tribunal Users* (2011, Law Centre NI).

[9] G McKeever, "A Ladder of Legal Participation for Tribunal Users" (2013) *Public Law* 575

[10] See for example, E Barrett-Howard & T Tyler, "Procedural Justice as a Criterion in Allocation Decisions" (1986) 50 *Journal of Personality & Social Psychology* 296; T Tyler, "What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures" (1988) 22 *Law & Society Review* 103; E Lind, R Kanfer, & P Christopher Garley, "Voice, Control, and Procedural Justice: Instrumental and Non-instrumental Concerns in Fairness Judgments" (1990) 59 *Journal of Personality & Social Psychology* 952; T Tyler, *Why people obey the law* (1990, Princeton University Press); E Lind & P Earley, "Procedural Justice and Culture" (1992) 27 *International Journal of Psychology* 227; L Solum, "Procedural Justice" (2004) 78 *Southern California Law Review* 181; T Tyler, "Procedural Justice and the Courts" (2007) 44 *Court Review* 217

and in the legal norms that are applied to particular cases has long been a feature of legal philosophy and jurisprudential inquiry. It is most obviously associated with Rawls' *Theory of Justice*, in which he defines different forms of procedural justice that have the potential to generate a sense of distributional fairness.[11] In social psychology, however, Thibaut is widely regarded as one of the leading writers on procedural justice and his early empirical work with Walker demonstrated the role of procedural justice in relation to legal processes, establishing the need for legal systems to comply with perceptions of fairness as part of the social contract between citizens and state.[12] The principles by which procedural justice could be achieved were articulated by, most notably, Leventhal,[13] and then Tyler,[14] with each overlapping the other. Tyler's work has guided much recent thinking on procedural justice within the legal system and sets out four principles. First is voice, which provides individuals within the court system the opportunity to tell their story and to be heard. Second is neutrality, based on the need for legal processes to be transparent, consistent, open and capable of being explained and understood.[15] Third is respect, in which individuals are seen as being important and valuable and are taken seriously within the process.[16] Fourth is trust, where the focus is on whether participants are being listened to and their views considered by honest actors.[17]

One of the core attributes of procedural justice is its ability to influence the attitudes of those who use or are subject to the justice system. Greenber and Folger describe the 'fair process effect' that sees procedural justice as a synonym for 'fair', where this fairness and attendant sense of legitimacy establishes and maintains public confidence in the legal system.[18] Solum makes the case for a "participatory legitimacy thesis" that sees adjudicative procedures as creating legal norms which (like other norms) require rights of participation to establish legitimacy.[19] In this way, Solum aligns participation with normative legitimacy, not just psychological acceptability, further acknowledging that "a right to participation in decision-

[11] J Rawls, *A Theory of Justice* (1971, Harvard University Press), in which Rawls distinguishes between three general kinds of procedural justice: (1) "perfect" procedural justice, (2) "imperfect" procedural justice, and (3) "pure" procedural justice.

[12] J Thibault and L Walker, *Procedural Justice: A Psychological Analysis* (1975, Hillsdale)

[13] G Leventhal, "What Should Be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships", in K Gergen, M Greenberg and R Willis (eds) *Social Exchange* (1980, Springer). Leventhal's work explores the limitations of 'equity theory' and articulates not just the principles of procedural justice but six rules which govern it: (1) consistency, (2) bias suppression, (3) accuracy, (4) correctability, (5) representativeness and (6) ethicality

[14] T Tyler, "Procedural Justice and the Courts" (2007) 44 *Court Review* 217

[15] Leventhal also identified voice and neutrality as principles of procedural justice: G Leventhal, "What Should Be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships", in K Gergen, M Greenberg and R Willis (eds) *Social Exchange* (1980, Springer)

[16] This principle reflects an identity based view of procedural justice, relating back to Leventhal's principle of status recognition: G Leventhal, "What Should Be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships", in K Gergen, M Greenberg and R Willis (eds) *Social Exchange* (1980, Springer); See also J Mashaw, *Due Process in the Administrative State* (1985, Yale University Press) for an articulation of the dignitary value of procedural justice

[17] Again, there are overlaps here with Leventhal's work and the principle of benevolence: G Leventhal, "What Should Be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships", in K Gergen, M Greenberg and R Willis (eds) *Social Exchange* (1980, Springer)

[18] J Greenberg and R Folger, "Procedural Justice, Participation and the Fair Process Effect in Groups and Organizations", in P Paulus (ed), *Basic Group Processes* (1983, Springer-Verlag)

[19] L Solum, "Procedural Justice" (2004) 78 *Southern California Law Review* 181, 275

making processes is valuable because it respects the dignity and autonomy of those who are affected by the outcome of those processes."[20]

The role of participation within procedural justice is not contested (either in the literature or this article) but the concept of participation is itself complex. Participation is generally understood as the ability of individuals to have a say in decisions that affect them. The nature of the participative experience, however, is largely dictated by the power and knowledge that the participant has, or is given. Where the power is withheld by the decision maker, then participation is a futile or tokenistic gesture towards inclusive decision making. Where power is shared, participation becomes a genuine partnership that enables all voices to be heard and to have weight. Procedural justice demands that the participant in the legal process is heard, respected and considered as part of the decision making process, but what is not clear from the literature is how this participation can be assessed as having met the principles of voice, neutrality, trust and respect.

What may be instructive here is the model of legal participation, based on empirical research with tribunal users, that captures the different types of participative experiences within the dispute resolution processes that culminate in a tribunal hearing. This model, derived from Arnstein's seminal model of participation,[21] categorises the forms of participation ranging from those forms in which the user feels isolated within the legal process through to those forms in which the user feels enabled (Figure 1).

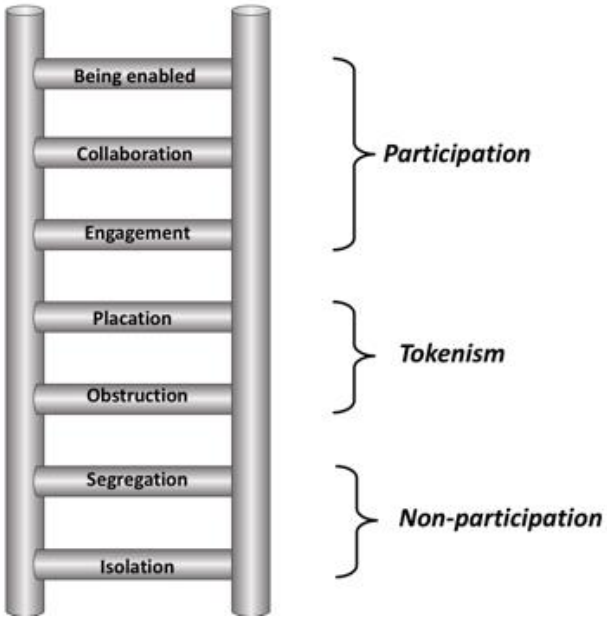


*Figure 1: McKeever's ladder of legal participation*

Each of the rungs on the ladder defines a form of participative experience, characterised by the extent to which the individual faces intellectual, practical or emotional barriers to participating. The more significant the barriers, the lower the rung of participation. The

[20] L Solum, "Procedural Justice" (2004) 78 *Southern California Law Review* 181, 263
[21] S R Arnstein, "A ladder of citizen participation" (1969) *Journal of the American Planning Association* 216

bottom rung is isolation, where the individual feels excluded and alone within the dispute resolution process, either because they do not want to participate, or see their participation as futile. Segregation is where users feel segregated from the official dispute resolution process or secondary within it, since the process is designed for the benefit of decision makers and power holders rather than for those who need to use the system to access their rights. Further up the ladder, tokenistic forms of participation include obstruction of the user's progress through the dispute resolution process. This can take the form of referral fatigue, the provision of inaccurate or incomplete information by decision makers which inhibits or obstructs the user's knowledge, or through delays in resolving the dispute. Placation occurs where decision makers provide assistance that does not fully assist users. Critically, this can include situations where users have access to advice and/or representation that is of poor quality and masks the intellectual, practical and emotional barriers to participation that may remain. The top three rungs relate to experiences where there is greater evidence of effective participation. Engagement exists where users are able to navigate successfully through the dispute resolution process and communicate with its actors so that the user understands everyone's role and position within the process. Collaboration exists where users are supported in their efforts to join decision makers in a co-operative venture. Finally, being enabled reflects the efforts made by tribunal actors to empower users to understand and present their case in a meaningful way. Advice and representation may be critical to securing participation, where good representation is not just about ensuring a successful outcome of the user's dispute, but also about ensuring that users have an effective voice within the legal process that relates to their social world.

Understanding fairness, legitimacy, dignity and democracy as part of procedural justice demands a fuller understanding of the user's participation. While this understanding has been advanced in relation to tribunals, this has not involved a comparative focus on understanding participation in relation to courts although this may well facilitate a better understanding of differences between courts and tribunals. There have been numerous attempts to identify the differences and similarities between civil courts and tribunals, but they are worth revisiting in light of this analysis of participation.

## The differences between courts and tribunals?

The decision as to whether dispute resolution lies with a court or a tribunal is not one made by the user, but rather one made by the legal system. Fuller's examination of adjudication questions whether "the 'essence' of adjudication lies in the mode of participation it accords to the affected party" or "in the office of judge."[22] The litigant's role is simply to navigate the particular part of the system where her dispute has been housed. It remains an empirical question whether litigants can participate more effectively depending on whether the judge determining their case is attached to a court or a tribunal. It seems reasonable, based on a long-standing structural separation of courts and tribunals, to hypothesise that the adjudicative venue creates a different participative experience, but the merger of courts and

[22] L Fuller, "The Forms and Limits of Adjudication" (1978) *Harvard Law Review* 92(2): 353, 365

tribunals into a single agency in different parts of the UK calls such structural distinctions into question.[23]

The 2001 Leggatt review of tribunals that preceded this merger identified three features that would distinguish whether a dispute should be decided by a tribunal rather than a court.[24] The first was participation: tribunal users would be able to present their own cases "if helped by good-quality, imaginatively presented information, and by expert procedural help from tribunal staff and substantive assistance from advice services", whereas court litigants would expect to participate through an advocate.[25] The second was the need for specialist expertise to inform tribunal decisions, which could be provided by the tribunal members, as distinct from the civil courts which rely on expert opinion and evidence produced by the parties. The third was expertise in administrative law, requiring consideration to be given within any new regulatory scheme as to whether a right of appeal is required and what that might look like, recognising that the remedy of judicial review is expensive and difficult. Recent developments in courts, tribunals and administrative decision-making processes suggest that these clear distinctions are worth re-examining.

## Expertise in administrative law

Leggatt's third criterion – of expertise in administrative law – appears the most unassailable. Adjudication of legal entitlements arising from often technical regulations was the one of the purposes for which tribunals were first developed,[26] and the growth in the number and remit of administrative tribunals has inevitably generated considerable administrative law expertise. It is also clear that the appeal courts have been deferential to the tribunals whose decisions are under appeal, on the basis of this expertise.[27] Yet there are cracks in this argument, at least at the Upper Tribunal (UT) level. As Elliott and Thomas explain, the caseload of the Administrative Court in England and Wales has increased significantly over recent years,

[23] Broadly speaking, in Britain, the merger of courts and tribunals resulted in the creation of Her Majesty's Courts and Tribunals Service (HMCTS), while in Northern Ireland the merger resulted in the Northern Ireland Courts and Tribunals Service. This broad picture is complicated by the fact that the geographical jurisdictions of different tribunals vary. Most tribunals within HMCTS are England, or England and Wales only. The Immigration tribunal is the only UK-wide tribunal, while Northern Ireland and Scotland have their own tribunals relating to devolved powers, and there are five Welsh tribunals which hear challenges to decisions made by Welsh public bodies.

[24] Sir A. Leggatt, *Tribunals for Users: One System, One Service,* (2001, TSO) para.s 1.11-13

[25] Sir A. Leggatt, *Tribunals for Users: One System, One Service,* (2001, TSO) para 1.11

[26] Sir O Franks, *Committee on Administrative Tribunals and Enquiries* (1957, Lord Chancellor's Department)

[27] See E Jacobs, *Tribunal Practice and Procedure* (2016, LAG) para.s 1.132-1.146. One of the most striking examples of this deference was in the House of Lords decision in *Hinchy v Secretary of State for Work and Pensions* (2005) UKHL 16, in which their Lordships reinstated the decision of the Social Security Commissioner, overruling the Court of Appeal. Lord Hoffman, giving the judgment, stated that the Court of Appeal's decision amounted to a "rejection of the principles developed and applied by the Commissioners over a number of years" and that this was problematic as the Commissioners "have practical experience of the day-to-day working of the benefit system and ... the principles they have devised to give effect to the legislative scheme dealing with overpayments are entitled to great respect." (para.s 28-29)

creating "delays and an evident desire for the court to focus its limited resources."[28] One of the court's responses to this problem was to transfer some of the judicial review caseload to the UT.[29] The decision to allocate such hearings to the UT is not because the Administrative Court lacked expertise, or because the participative experience was likely to be qualitatively different, but simply for efficiency purposes, reverting back to the original motivation for the creation of tribunals: to keep a review of regulatory regimes from clogging up court based reviews of other types of everyday problems.[30]

The drive for efficiency in legal process is entirely legitimate, but it is not clear whether tribunal efficiency is a cause or effect: are tribunals efficient because they deal only in one legal specialism, or is their administrative expertise the reason why they are efficient? [31] In practical terms the distinction may be irrelevant, but as a reason for distinguishing between courts and tribunals, it may be that the difference Leggatt attributes to courts and tribunals is more mutable than he suggests. This may be particularly so under the new modernisation programme being advanced by HMCTS, where the move to online dispute resolution will require a fresh look at "the challenges in translating legal process values – transparency, fairness, participation, judicial independence and open justice – to the digital sphere."[32] One of the most critical tasks in matching legal and technological expertise to the legal problems of individual citizens will be the impact on participation and procedural justice.[33] Such challenges – yet to be fully understood – will apply equally across tribunals and courts and may themselves reveal as many similarities as differences between the relative efficiencies and expertise of each.

## Specialist expertise

Specialist expertise in tribunals may relate to the legal expertise of tribunal judges or the expertise provided by non-legal members on relevant evidential issues such as finance, health, employment or education. Despite this, however, specialist expertise in tribunals is often accessed through expert evidence – for example, written and oral testimony relating to functional capacities or special educational needs – just as it is in courts, and tribunal judges

[28] M. Elliott and R. Thomas (2012) "Tribunal Justice and Proportionate Dispute Resolution" *Cambridge Law Journal* 297, 302

[29] See R. Thomas and J. Tomlinson, *Immigration Judicial Reviews: an empirical study* (2019; University of Manchester)

[30] Efficiencies in transferring juridical reviews to the Upper Tribunal may also flow from the fact that judicial salaries in the Upper Tribunal are typically lower than in the Administrative Court. Mullen makes the overall point that tribunals have lower unit costs per case than courts in large part because of the proportionally greater use in tribunals of fee-paid chairs/judges as opposed to salaried judges: T Mullen, "A Holistic Approach to Administrative Justice?", in M Adler (ed) *Administrative Justice in Context* (2010, Hart: Oxford), 399

[31] J Tomlinson and B Karemba (2019) "Tribunal Justice, Brexit, and Digitalisation: Immigration Appeals in the First-tier Tribunal" *Immigration, Asylum and Nationality Law* 33: 47-65

[32] R Thomas and J Tomlinson, "Remodelling social security appeals (again): the advent of online tribunals" (2018) *Journal of Social Security Law* 84, 98-99

[33] R Thomas and J Tomlinson, *The Digitalisation of Tribunals: What we know and what we need to know* (2018, Public Law Project). See also M Federman, "On the Media Effects of Immigration and Refugee Board Hearings via Videoconference" (2006) *Journal of Refugee Studies* 19: 433; IV Eagly, "Remote Adjudication in Immigration" (2015) *Northwestern University Law Review* 109: 933

can – and do – sit alone in some cases, without the specialist input of expert panel members. It must also be accepted that tribunal expertise "is … not a given fact, but something to be demonstrated – principally through the quality of a tribunal's decisions and reasons."[34] Additionally, as Cane argues, although the civil courts have a wide jurisdiction it is also the case that "individual [civil court] judges may specialise in particular areas of law, such as intellectual property".[35] This mirrors the expertise acquired by tribunal judges. A further reflection between the courts and the new tribunal system established following Leggatt's review is the cross-ticketing of tribunal members. The high caseload of immigration judicial reviews that resulted in moving cases from the Administrative Court to the Upper Tribunal also resulted in social security judges from the Administrative Appeals Chamber being drafted in to assist with the caseload. This suggests that – like their court colleagues – the legal expertise of tribunal judges can be wide as well as deep. The value of distinguishing between courts and tribunals on this basis therefore appears limited.

## Participation

Differences in the nature and extent of participation between courts and tribunals, however, may be substantial. Gaze and Hunter's research, for example, examines the different adjudicative experiences of federal anti-discrimination claimants in Australia.[36] Complainants alleging discrimination under Australian federal law were able to bring their complaints to the Australian Human Rights and Equal Opportunities Commission (HEROC) through a relatively informal tribunal hearing where HEROC would make an adjudicative determination.[37] However, the implications of an Australian High Court decision meant that HEROC was judicially defined as an administrative tribunal, and thus unable to make binding decisions on federal anti-discrimination matters.[38] The solution to this disempowerment of the tribunal was to shift the adjudication of federal anti-discrimination matters from HEROC to the federal courts, the consequence of which was an increase in the formal and intellectual barriers for litigants in resolving their disputes, leading to a significant change in the claimants' experience of adjudication. One of the difficulties of applying this example to the UK, however, is that Australian tribunals are different from UK tribunals – they are categorised as executive rather than judicial bodies – and so the participative distinction found by Gaze and Hunter may be specific to that jurisdiction.[39] Whether this means that there will be participative differences between all or other courts and tribunals therefore remains a live issue, and one that empirical research could illuminate.

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[34] M. Elliott and R. Thomas (2012) "Tribunal Justice and Proportionate Dispute Resolution" *Cambridge Law Journal* 297, 318

[35] P Cane, *Administrative Law*, (2011, Oxford University Press) 320

[36] B Gaze and R Hunter, "Access to justice for discrimination complainants: courts and legal representation" (2009) *UNSW Law Journal* 699.

[37] HEROC was the predecessor body to the Australian Human Rights Commission

[38] *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

[39] P Cane, *Administrative Tribunals and Adjudication* (2010, Hart). See also Groves, who examines the duty to inquire in Australian administrative tribunals and questions whether even these tribunals are inquisitorial in any true sense of the term, despite an arguably greater requirement to be so: M Groves, "The Duty to Inquire in Tribunal Proceedings" (2011) 33 *Sydney Law Review* 177

It is reasonable to expect that litigants should be able to participate in court processes, especially when assisted by effective information, expert court staff and good quality pre-hearing advice, just as Leggatt envisaged in his normative model for tribunal hearings. Yet the normative tribunal model does not reflect the reality: tribunals may now be more enabling but there will still be tribunal users who remain unable to participate, despite progress here.[40] Similarly, the hope that courts could be sufficiently inquisitorial to enable all litigants to participate also appears limited. Research on unrepresented litigants in civil and family law cases makes it clear that there are limitations on the ability of the judge to assume an inquisitorial role to ensure their participation.[41] Some litigants will require more support than an inquisitorial court process could provide, in much the same way as some tribunal participants may require additional support beyond that offered by the tribunal to overcome their participative barriers.[42]

This begs the more fundamental question of whether there is such a thing as an inquisitorial process within the UK legal system. Thibault and Walker's ground-breaking research on procedural justice that compared adversarial and inquisitorial legal systems was based on a comparison of the American and French legal systems, rather than a comparison of different adjudicative procedures within the same legal system.[43] The American and the French legal systems are entirely different, effectively invalidating the adversarial/inquisitorial distinction.[44] It is perhaps more accurate to view UK courts and tribunals as existing on an adjudication spectrum, at one end of which Jolowicz identifies the "theoretically pure adversary system" while at the other end is the "theoretically pure inquisitorial" process.[45]

Most court procedures are positioned towards the adversarial end of the spectrum (especially those encountered in the higher courts). The court system is designed to test the evidence in a case through the presentation of opposing arguments by plaintiffs and defendants, with

[40] Adler's research highlights the value of pre-hearing advice but in the context of tribunals becoming more enabling: M. Adler (2009) "Tribunals ain't what they used to be" *Adjust Newsletter,* available at http://ajtc.justice.gov.uk/adjust/articles/AdlerTribunalsUsedToBe.pdf. The tribunal participation model demonstrates that not all tribunals are enabling and not all tribunal users are able to participate.

[41] G McKeever, L Royal-Dawson, E Kirk and J McCord, *Litigants in Person in Northern Ireland: Barriers to Legal Participation* (2018; Ulster University); L Trinder, R Hunter, E Hitchings, J Miles, R Moorhead, L Smith, M Sefton, V Hinchly, K Bader and J Pearce, *Litigants in Person in Family Law Cases* (2014, MOJ Analytical Series)

[42] See for example *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123 in which Sir Ernest Ryder, Senior President of Tribunals, makes clear the tribunal's duty to ensure that the appellant is able to participate effectively in the hearing, to ensure that proceedings are fair and just, as required by the overriding objective in rule 2 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008

[43] J Thibault and L Walker, *Procedural Justice: A Psychological Analysis* (1975, Hillsdale).

[44] The central plank of this argument is that the adversarial system privileges the opportunity for disputants to explain their positions, where the inquisitorial system limits this opportunity by not making explicit provision for the disputants to put their evidence forward

[45] J. A. Jolowicz, "Adversarial and inquisitorial models of civil procedure" (2003) *International and Comparative Law Quarterly* 281. See also T Mullen, "A Holistic Approach to Administrative Justice" in M Adler (ed) *Administrative Justice in Context* (2010, Hart)

such arguments then weighted and adjudicated by the judge.[46] Both Fuller and Zuckerman regard the adversarial presentation as only way that the "natural human tendency" towards confirmation bias can be overcome.[47] In Zuckerman's analysis there is no alternative model for courts, and he dismisses the "myth" of an inquisitorial system:

> "If by inquisitorial process one means a process in which the court of its own initiative decides how to define the issues, what evidence should be called, tests such evidence and investigates the conflicting allegations by considering arguments for and against, then no such procedure is in operation today in any advanced system."[48]

The empirical evidence would certainly indicate that tribunal processes do not correspond to this mythical inquisitorial approach, most recently indicated in relation to immigration tribunals where judges were observed to adopt a variety of approaches across the adjudication spectrum, by no means limited to an inquisitorial tradition.[49] Indeed, Thomas' analysis indicates that tribunals have adopted an adversarial approach as their default position,[50] and merely, as Mullen describes it, "applied an inquisitorial gloss to a basically adversarial process."[51]

Whether such a "theoretically pure inquisitorial" process exists is therefore open to debate, but a related debate is whether the "theoretically pure adversarial system" is also a myth today. Jolowicz notes the demise of adversarial purity as a result of changes in English procedural law: those that require the judge to be familiar with the skeleton arguments, witness statements, and expert reports before the case is heard; the increased judicial powers under the Civil Procedure Rules to control the evidence in the case; and the increased focus on persuading litigants to settle their disputes outside the court.[52] In Cane's view, courts and tribunals stem from the same skeleton of the Civil Procedure Rules, with the result that "[i]n terms of procedure and modes of operation, courts and tribunals are similarly diverse, ranging

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[46] This point is also made by Owusu-Bempah in relation to criminal courts in England and Wales, which she argues can no longer be characterised as adversarial, creating a departure from legal norms, resulting in compulsory 'active' (as opposed to 'passive') participation by defendants in criminal trials in breach of their rights under Article 6 ECHR: A Owusu- Bempah, *Defendant Participation in the Criminal Process* (Routledge: 2018)

[47] L Fuller, "The Forms and Limits of Adjudication" (1978) 92 *Harvard Law Review* 353, 383; A. Zuckerman, "No justice without lawyers – the myth of an inquisitorial solution" (2014) *Civil Justice Quarterly* 355-374, 356

[48] A. Zuckerman, "No justice without lawyers – the myth of an inquisitorial solution" (2014) *Civil Justice Quarterly* 355-374, 356. See also Groves, who argues that "it is widely accepted that an extreme version of either [an inquisitorial or adversarial model is undesirable and that no country adopts a pure or full version of either.": M Groves, "The Duty to Inquire in Tribunal Proceedings" (2011) 33 *Sydney Law Review* 177, 181

[49] R. Thomas and J. Tomlinson, *Immigration Judicial Reviews: an empirical study* (2019; University of Manchester)

[50] R Thomas, "From 'adversarial v inquisitorial' to 'active, enabling and investigative': developments in UK administrative tribunals", in L Jacobs and S Baglay (ed.s) *The nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Ashgate: 2013) 61

[51] T Mullen, "A Holistic Approach to Administrative Justice?", in M Adler (ed) *Administrative Justice in Context* (2010, Hart: Oxford), 391.

[52] J. A. Jolowicz, "Adversarial and inquisitorial models of civil procedure" (2003) *International and Comparative Law Quarterly* 281, 286-288.

from the very formal and adversarial to the much less formal and inquisitorial."[53] Once again, the empirical evidence would tend to bear this out. Research on litigants in person in the civil and family courts revealed a variety of judicial behaviours in their adjudication techniques, some of which were clearly in the more adversarial tradition while others adopted a more inquisitorial approach to help determine the relevant facts to be adjudicated, indicating that the spectrum of adjudication is evident in both settings.[54] Thomas argues that (for tribunals) the language of adversarial/inquisitorial is redundant, and should instead be replaced by concepts of active adjudication.[55] This blending of the position of courts and tribunals on the adjudication spectrum does, however, reinforce the problem of establishing whether there are any differences between courts and tribunals.

The regulation of administrative schemes was the original reason for the creation of tribunals, and may still be a justifiable basis for distinguishing courts from tribunals, but beyond this – and despite Leggatt's clear characterisation of some distinguishing features – arguably there is as much common ground here as distinctiveness between courts and tribunals. More significantly for this paper, if the logic that underpins the differentiation of expertise and the categorisation of courts-as-adversarial and tribunals-as-inquisitorial is flawed, then we must also question whether the participative experiences of court and tribunal users are different. If we accept the premise of an adjudication spectrum, empirical evidence places tribunals, not just courts, towards the adversarial end of that spectrum. If this is the case, then a logical consequence may be that the participative experiences of court litigants will be similar to those of tribunal users, as indicated by research on the participative barriers for litigants in person in the civil and family courts.[56] At the very least, what this opens up is the potential for participation to be the lens through which differences between courts and tribunals can be examined.

## Participative links between courts and tribunals

The continued drive towards the modernisation of the courts and tribunals system – the digitalisation of justice, the creation of a unified judiciary and the construction of an integrated courts and tribunals service – alongside divergence in process, with the greater use of alternative dispute resolution mechanisms in administrative justice decision making, for example[57] – means that it is important to question whether there is still any mileage in the traditional distinction between courts and tribunals. Equally important, however, is how that

[53] P Cane, *Administrative Law*, (2011, Oxford University Press) 320

[54] G McKeever, L Royal-Dawson, E Kirk and J McCord, *Litigants in Person in Northern Ireland: Barriers to Legal Participation* (2018, Ulster University); L Trinder, R Hunter, E Hitchings, J Miles, R Moorhead, L Smith, M Sefton, V Hinchly, K Bader and J Pearce, *Litigants in Person in Family Law Cases* (2014, MOJ Analytical Series)

[55] R Thomas, "From 'adversarial v inquisitorial' to 'active, enabling and investigative': developments in UK administrative tribunals", in L Jacobs and S Baglay (ed.s) *The nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Ashgate: 2013) 61

[56] G McKeever, L Royal-Dawson, E Kirk and J McCord, *Litigants in Person in Northern Ireland: Barriers to Legal Participation* (2018, Ulster University)

[57] See R Thomas and J Tomlinson, *The Digitalisation of Tribunals: What we know and what we need to know* (2018, Public Law Project).

question is answered. There are many criteria by which courts and tribunals can be compared including the nature of representation, the availability of legal aid, the cost to the parties, the formality of the proceedings and the time frame for resolving disputes.[58] Further exploration of each of these would prove insightful in understanding any distinctions or similarities between courts and tribunals, building a more holistic understanding of how disputes should be categorised and dealt with by the legal system. Comparative empirical data will continue to illuminate the theoretical discussions on the changing landscape of justice but there is also a need to underpin this with a understanding of what the values of a justice system should be.

Participation – as a core element of procedural and substantive justice and of legal values embedded in procedural rules – offers the potential to understand the legal landscape from the user's perspective and to bring to bear the principles and experiences that users value. The intellectual, emotional and practical barriers that dictate the nature of legal participation provide a realistic starting point that can also encompass issues of representation, accessibility and formality – as existing empirical data illustrates – that can enable a better understanding of whether the traditional court-versus-tribunal distinction remains worthwhile.

Intellectual barriers identified by the tribunal-based model of legal participation seem equally relevant for court users. These barriers impact on an individual's ability to prepare for and follow the hearing and relate to the user's inability to create the foundations for a factual and legal narrative of their case, to understand the significance or the role of documentation, or to know what constitutes relevant information. In both court and tribunal settings, we know that the terminology or language used by judges and lawyers can act as an intellectual barrier that blocks participation which, in the language of the legal participation model, leave users isolated or segregated within the legal process.[59] The role of representation is identified in the tribunal model as having the potential to remove participative barriers but poor representation can create additional barriers by failing to empower individuals to make informed decisions about their own cases, and masking the lack of understanding that tribunals might otherwise seek to overcome. Given the disadvantages faced by litigants in person in representing themselves in court, it would be easy to draw the conclusion that legal representation will enable effective participation, but this is not something that can be assumed. Evidence from litigants in person is that one of the reasons for self-representation is a dissatisfaction with legal representatives who are not seen as giving voice to the litigant

[58] See for example the report by JUSTICE that rejects the court/tribunal distinction in favour of 'justice spaces' with the recommendation that the determination of the most appropriate justice space should be driven by "the characteristics and demands of the particular case to be heard, including: the level of security risk posed by the proceedings; the need for formality and/or solemnity; the anticipated degree of public participation; whether participants in the proceedings consent to the judicial process and; the extent to which parties may need to be segregated.": *What is a court?* (2016), p 3, available at https://justice.org.uk/wp-content/uploads/2016/05/JUSTICE-What-is-a-Court-Report-2016.pdf

[59] See for example N Balmer, A Buck, A Patel, C Denvir and P Pleasence, (2010) *Knowledge, Capability and the Experience of Rights Problems Research Report* (Plenet, Legal Services Research Centre: 2010); P Pleasance and N Balmer, *How people resolve 'legal' problems* (Legal Services Board: 2014); R Blakey, "Family mediation after LASPO: the accessibility and relevance of public information" (2018) 48(8) *Family Law* 1057-1061

and therefore block their participation.[60] Beyond this, the variation in judicial interventionism which can assist or compound intellectual barriers is exposed in both tribunal- and court-based empirical research and offers further potential to see whether participants in these legal processes regard the systems as distinct.[61] Putting this alongside the increasingly defunct distinction between adversarial courts and inquisitorial tribunals suggests that the role of legal representation from a participation perspective provides a valid means of understanding commonalities and differences between courts and tribunals.[62]

Practical barriers to participation are those that relate to the legal venue, procedures and documentation: from not knowing how and where to obtain relevant documentation to more mundane issues of not knowing what building, or part of the building, the hearing will be in, hindering practical and psychological preparation by users. The evidence of individual citizens struggling with overcoming practical barriers to resolve their disputes is significant, and on this issue there is no obvious distinction between court and tribunal user experiences. A focus on whether practical barriers are distinctive for tribunal or court participants also seems relevant in light of the burgeoning literature on the physical architecture of the courtroom that can "marginalise participatory justice".[63] Where there is a physical separation of a court litigant from their representative and the judge, the potential for isolation (as a type of participation) becomes a product of how the litigant's needs are ignored.[64] The literature on the design and architecture of courts testifies to this point.[65] Lawyers sit or stand before the judge at the front of the court, with their backs to the litigants who must sit at the rear of the courtroom on the public benches. This practical barrier of being physically far removed from their lawyers prevents any intervention in the proceedings. While the tribunal research involved proceedings where users and their representatives sat together with equal proximity to the tribunal judge, the increased use of courtrooms for tribunal hearing may undermine any distinction here, where the architectural structure underpins the dominance of lawyers

[60] G McKeever, L Royal-Dawson, E Kirk and J McCord, *Litigants in Person in Northern Ireland: Barriers to Legal Participation* (2018, Ulster University), p 88

[61] For evidence of the interventionist approach by judges with litigants in person see G McKeever, L Royal-Dawson, E Kirk and J McCord, *Litigants in Person in Northern Ireland: Barriers to Legal Participation* (2018, Ulster University); L Trinder, R Hunter, E Hitchings, J Miles, R Moorhead, L Smith, M Sefton, V Hinchly, K Bader and J Pearce, *Litigants in Person in Family Law Cases* (2014, MOJ Analytical Series). The adoption of a more interventionist approach in research on immigration tribunals this was a key finding: R. Thomas and J. Tomlinson, *Immigration Judicial Reviews: an empirical study* (2019; University of Manchester)

[62] While there has not been the equivalent rise in the LIP population in NI as in England and Wales, research in NI showed that dissatisfaction with, or lack of trust in lawyers was a reason why individuals choose to self-represent: G McKeever, L Royal-Dawson, E Kirk and J McCord, *Litigants in Person in Northern Ireland: Barriers to Legal Participation* (2018, Ulster University), pp 87-88

[63] L Mulcachy, "Architects of Justice: the Politics of Courtroom Design" (2007) *Social and Legal Studies* 16(3): 383, at 398. See also P Carlen (1976) *Magistrates' Justice*, London: Martin Robertson

[64] L Mulcachy, "Architects of Justice: the Politics of Courtroom Design" (2007) *Social and Legal Studies* 16(3): 383

[65] M Rossner, D Tait, B McKimmie and R Sarre "The dock on trial: courtroom design and the presumption of innocence' *Journal of Law and Society* (2017) 44 (3): 317; E Rowden, A Wallace, D Tait, M Hanson, M and D & Jones, *Gateways to Justice: Design and Operational Guidelines for Remote Participation in Court Proceedings* (University of Western Sydney: 2013); L Mulcachy, "Architects of Justice: the Politics of Courtroom Design" (2007) *Social and Legal Studies* 16(3): 383; P Carlen (1976) *Magistrates' Justice*, London: Martin Robertson

and judges at the expense of other participants.[66] Finally, concerns about the practical barrier to participation of the time required to attend legal proceedings can help illuminate the impact of how courts and tribunals compare in the way that hearings are scheduled, structured and supported, with tribunals more frequently allocated to blocks of time within the same day, week or month, while court processes take a more staggered approach, with successive hearings over longer periods of time.

Emotional barriers to participation arise from the lack of familiarity with attending legal proceedings as well as concerns around the process and outcome of the hearing. This lack of knowledge about what to expect relates clearly to the emotional challenge of understanding how to behave in such an unfamiliar environment, where power imbalances are present. There is no reason to assume that court litigants will be better able to manage this than tribunal users, given the empirical evidence on the emotional impact of issues such as family disputes and personal bankruptcy.[67] There is clearly potential value in comparing the participative barriers across different areas and divisions of court work, which could deepen the analysis of which, not just whether, courts generate similar participative experiences to which tribunals.

A further distinct barrier that was not evident in the tribunal studies has emerged from research on litigants in person in civil and family courts, which is the attitudinal barrier. This was a general frustration voiced by judges, lawyers and court staff that those who were representing themselves were ill-equipped to do so; that the adversarial court system was premised on the requirement that litigants would be represented and those who appear without representation are in breach of this legal norm, with consequent negative results for the system.[68] While some administrative tribunals such as social security frequently encounter unrepresented parties – both state and appellant – and are less likely to see such arrangements as an aberration, more lawyer-heavy tribunals such as employment and immigration may experience more of an imbalance where unrepresented parties appear,[69] aligning them more closely with courts than other tribunals. As online dispute resolution becomes a more integral part of administrative justice, and as reductions in legal aid (particularly notable in England and Wales) make legal advice and representation less accessible in areas covering both court and tribunal expertise, the expectation that users will be represented has the potential to evolve considerably, further eroding not just traditional distinctions between courts and tribunals but the nature of legal participation and the need to understand barriers to participation in this new landscape.

[66] Greater rationalisation of the court estate throughout the UK has led to some tribunal hearings taking place in courtrooms, with tribunal centres being closed

[67] G McKeever, L Royal-Dawson, E Kirk and J McCord, *Litigants in Person in Northern Ireland: Barriers to Legal Participation* (2018, Ulster University)

[68] G McKeever, L Royal-Dawson, E Kirk and J McCord, *Litigants in Person in Northern Ireland: Barriers to Legal Participation* (2018, Ulster University)

[69] G McKeever and B Thompson, *Redressing Users' Disadvantage: Proposals for Tribunal Reform in Northern Ireland* (Law Centre NI: 2010)

## Should there be a distinction between courts and tribunals?

This article has argued that the user experience of courts and tribunals is not dictated by the formal categorisation of each, and that the historical assumptions of differences between courts and tribunals are not borne out by empirical research on how individual citizens experience the relative formality, procedures, legalism, and the adversarial or inquisitorial approaches of each venue. For those who use courts and tribunals – particularly where they do so without legal or specialist support – other values and characteristics may be prioritised, including the ability to participate effectively in the proceedings so that the outcome is meaningful and understood. Leggatt recognised that the perspective of the tribunal user was critical and his review of tribunals rationalised administrative justice through the concept of citizen redress, rather than through the traditional institutional distinctions of complaint or appeal. The Commission on Justice in Wales has taken this rationalisation further, stating that there is a need to unify civil courts and tribunals, pointing to the example of housing law where the different ways in which dispute resolution spans both venues is argued to be illogical.[70]

The argument that civil courts and tribunals should be unified has its attractions, though it is clear that it not without problems.[71] Chief among these is that there remain critical differences between civil and administrative justice. Genn defines civil justice as a public good, and as a system of social and economic importance that balances efficiency with substantive justice.[72] The administrative justice system is defined by Adler as "[t]he principles that can be used to evaluate the justice inherent in administrative decision-making."[73] While both are clearly fundamental to the rule of law,[74] critically, administrative justice is broader than just tribunals. Structurally, administrative justice extends to courts and tribunals as well as public bodies, ombudsmen, commissioners, statutory complaint handlers, politicians and advice service providers.[75] Conceptually, however, administrative justice is intended to be preventative and remedial as well as procedural. In this conceptualisation, individual forms of dispute resolution within administrative justice serve the dual purpose of justice with accountability – individual citizens holding public bodies and their decision-makers to account for their actions – and consequentially improving public administration. The outcome should be that public bodies are not just required to make the right decision (or rectify the wrong one) but have the opportunity to learn and improve, benefiting all citizens and improving efficiency.[76] As Cane explains:

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[70] Commission on Justice in Wales, *Justice in Wales for the People of Wales* (2019) para.5.56

[71] See for example S Nason (ed), *Administrative Justice in Wales and Comparative Perspectives* (2017, University of Wales); T Mullen, T Mullen, "A Holistic Approach to Administrative Justice?", in M Adler (ed) *Administrative Justice in Context* (2010, Hart: Oxford) 415-417

[72] H Genn, *Judging Civil Justice* (2009, Cambridge University Press: Cambridge)

[73] M Adler, "A Socio-Legal Approach to Administrative Justice" (2003) 25 *Law and Policy* 323

[74] See for example the report by the Commission on Justice in Wales that identifies (at at para.6.1) the Rule of Law requirement that individuals can challenge decisions made by public bodies, alongside the emphasis that inhibiting citizens' access to civil justice imperils the Rule of Law (at para.5.11): *Justice in Wales for the People of Wales* (2019)

[75] S Nason, *Understanding Administrative Justice in Wales* (2015, Bangor University), 6

[76] There are numerous different models of administrative – or bureaucratic – justice, that represent the different trade-offs required by public administration systems, balancing the values of public administration with legal values: see J Mashaw, *Bureaucratic Justice* (1983, Yale University Press: New

> "improving the quality of administrative decision-making goes beyond not only the … idea that accountability may perform a normative function, but also what Mashaw calls 'the management side of due process' – the idea that *ex ante* recruitment practices, training programmes, management techniques and internal monitoring are at least as important as *ex post* scrutiny of individual decisions in raising and maintaining bureaucratic decision-making standards."[77]

Arguably, therefore, the broader impact (or potential for such) of individual tribunal decisions underlines the greater public need for effective participation – and the distinctive value that participation can bring.

While there are values common to each, there is also a need to understand tribunals and courts on their own terms and where there are differences or similarities these should be justified rather than assumed. The increased judicialization of tribunals and the increased complexity of procedural rules may not so much be evidence of convergence but the drivers of this. There are, of course, lessons that tribunals and courts can learn from each other and multiple lenses through which these can be viewed. For tribunals, the lens of public administration, focused on distributive justice, expediency, efficiency and informality, is balanced against the lens provided by legal values such as openness, fairness, rationality and impartiality that are equally common to courts. But the lens of participation offers something substantive and additional. A better understanding of legal participation reveals the flaws underpinning some of the assumptions around both tribunals and courts, revealing instead a spectrum of adjudication where some courts may be more participative than some tribunals, and vice versa. The challenge is not to allocate the space on the spectrum according to the label but to understand the participative potential of each venue, justifying why participation may be different rather than asserting that it is or ought to be so. This should not remove the distinction between the fields of civil and administrative justice but provide the impetus to justify normative models and frameworks for each. Mullen identifies the principled reasons why tribunals should be more accessible – more participatory – as a way of assessing when legal representation should be provided to tribunal users.[78] Such reasons sit equally well in understanding when litigants should be provided with legal representation for court hearings, but instead of proxies of vulnerability based on education or socio-economic background, an empirically informed understanding of how individuals participate could be used, driven by the necessity in courts and tribunals to ensure effective participation.

Participation gives us an insight into the degree and possibility (including the benefits) of convergence between courts and tribunals. It may well result in a convergence leaning towards the tribunalisation of courts, led by the participative learning and implications for tribunals.[79] Whatever the outcome, there is a need to add participation to the rationale for

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Haven; M Adler (ed) *Administrative Justice in Context* (2010, Hart: Oxford), chapters 6, 7 and 8. Some of these will prioritise user experience, while others will elevate other core elements, with those coming closest to prioritising participation arguably being Mashaw's judgement model, Adler's consumerist model and Halliday and Scott's egalitarian model.

[77] P Cane, *Administrative Tribunals and Adjudication* (2010, Hart: Oxford) 212-213

[78] T Mullen, "A Holistic Approach to Administrative Justice?", in M Adler (ed) *Administrative Justice in Context* (2010, Hart: Oxford) 415

[79] JUSTICE*, Understanding Courts* (2019) para.s 2.60-2.61

allocating particular disputes to particular justice processes. This does not displace the other means of distinguishing between various justice processes, but recognises that participation is as valid a consideration and is a way to improve how dispute resolution venues of all kinds can work for those who use them. Participation is a value common to both courts and tribunals, underpinned by Article 6, that should not be ignored in either setting.

## Conclusion

Fairness in legal process demands that the affected citizen is able to participate effectively: to be adequately informed about critical choices, to trust that a neutral arbiter will enable their engagement and hear their voice, and therefore to be able to exert influence on the outcome of the proceedings. Such participation is not merely concerned with litigant satisfaction but with legal legitimacy. Consequently, the requirement for participation is not confined to either courts or tribunals, but should apply equally to both since the choice of whether a dispute is resolved in court or tribunal is one that is not open to the citizen, but determined by the state. This point is recognised in the different procedural rules that govern the majority of courts and tribunals in the UK, which locate full participation as central to the overriding objective to deal with cases fairly and justly.

While the principled argument on the value of participation may be accepted, there remains a difficulty with knowing whether the outcome of participation has been achieved in a way that meets the principles of procedural justice or the core legal standard of effective participation under Article 6 ECHR. A model of legal participation, derived from the empirical evidence on tribunal user experience, helps articulate what legal participation is and what the barriers are in enabling user participation. This model also helps bring into focus the long-standing question on what distinguishes a court from a tribunal. If participation is required in both legal arenas, understanding whether there is something different about the barriers that tribunal users face compared to court litigants can help us understand what makes a court different from a tribunal. In his review of the tribunal system, Leggatt was clear that tribunals were distinct and different from courts: on the basis of their expertise in administrative law, the specialist expertise inherent within the tribunal; and in the capacity for tribunals to enable user participation without legal representation, where the default assumption for court litigants was that representation and participation were inextricably linked.

An examination of these grounds of purported differences, however, shows that what Leggatt defined as distinct approaches are now much less discrete to one venue over the other. Instead, the allocation of disputes on the basis of administrative expertise (and efficiency) is no longer confined only to tribunals, as the sharing of court and tribunal expertise on immigration demonstrates. Equally, the argument on the uniqueness of specialist expertise of tribunal panel members has weakened, in part through the reforms instigated by Leggatt's recommendation that tribunal members could be cross-ticketed across different tribunal jurisdictions, much as their court counterparts are in courts, while at the same time the potential for deep judicial expertise in courts becomes more evident. Most critically, perhaps, is the increasingly redundant stereotype of courts-as-adversarial and tribunals-as-

inquisitorial, with the mythology of adversarial and inquisitorial purity ruptured by the variation in judicial approaches across courts and tribunals.

The de-bunking of myths and the adaptations of judicial practice and legal process underline not just the evolution of courts and tribunals but the convergence of their approaches to dispute resolution. The academic arguments, however, should be moved on and the question of what makes a court different from a tribunal needs to be examined empirically from the perspective of court and tribunal users. The existing work on the participative barriers faced by tribunal users has provided a foundation on which further empirical evidence is being built, to examine participative experiences of court litigants.[80] While this provides important insight into how participative barriers for litigants in person mirror those faced by tribunal users, there remains significant potential to use the lens of legal participation to investigate whether a court or tribunal experience is sufficiently different for the citizen to justify distinguishing whether their case is attached to a court or a tribunal. If participation is to be protected as a core value of the justice system, as mandated by article 6 ECHR, by the principles of procedural justice and by most of the procedural rules by which courts and tribunals are bound, then understanding what legal participation means to court and tribunal users remains vital. This critical need also provides the opportunity to explore more fully the differences between courts and tribunals, and stimulates the potential for the justice system to evolve in ways that provide coherent protection for citizens, allocating disputes based on where the greatest participative potential lies.

[80] Research funded by the Nuffield Foundation to take forward the examination of participation by litigants in person in family courts is being conducted by G McKeever, L Royal-Dawson, J McCord and M Potkewitz at Ulster University (2019-2021)